



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oertzen & Co. GmbH

File: B-228537

Date: February 17, 1988

DIGEST

1. A contracting officer properly may base a determination of nonresponsibility on a preaward survey without affording an offeror the opportunity to explain or otherwise defend against the survey information, and the offeror need not be advised of the determination in advance of the award.

2. The specific financial qualifications to be considered in determining a contractor's responsibility are within the contracting officer's discretion and business judgment; reliance on a current independent financial report to determine that protester lacked financial capability is reasonable. Protester's attempt to submit evidence of the availability of a performance bond does not establish protester's financial responsibility.

DECISION

Oertzen & Co. GmbH protests the rejection of its low priced proposal and the award of a contract to Held & Francke under request for proposals (RFP) No. DAJA06-87-R-0083, issued by the Army to connect Dolan Barracks buildings to the district heat network of the city of Schwaebisch Hall.

We deny the protest.

Oertzen protests that the contracting officer erroneously determined that Oertzen was nonresponsible, based on inappropriate information, and failed to either advise Oertzen of negative information relating to Oertzen's responsibility, or to hold discussions on these deficiencies in violation of Federal Acquisition Regulation (FAR) § 15.610(c) (FAC 84-16).

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The contracting officer based his determination that Oertzen was nonresponsible primarily on information contained in a preaward survey conducted on September 15, 1987. The contracting officer found Oertzen nonresponsible for four reasons; we need only discuss two. First, Oertzen did not provide proof of its technical and production capability, nor did it provide proof of a satisfactory quality assurance system. Second, Oertzen did not demonstrate the financial resources to complete a project of a value of approximately DM 7,000,000. After rejecting Oertzen as nonresponsible, on September 30, the contracting officer awarded the contract to the next low offeror, Held & Francke.

Oertzen takes exception to all of the contracting officer's findings.

Oertzen challenges the contracting officer's reliance on an independent financial report on Oertzen by Schimmelpfeng (the German equivalent of Dunn and Bradstreet), dated September 16, 1987. The contracting officer concluded from the report that Oertzen was not financially capable of performing the contract. Oertzen states that it offered to provide a performance bond for the full amount of the contract and, had it known that the Army was concerned with its financial capability, it would have provided a performance bond early in the review process. Oertzen argues that since the Army did not express any such concern, and since the pre-award surveyor did not request balance sheets, annual statements and tax returns which would have shown Oertzen's financial status, the Army should not be allowed to find Oertzen nonresponsible based on the Schimmelpfeng report.

Oertzen likewise contends that the individual conducting the preaward survey did not ask Oertzen for proof of its technical and production capabilities, or for in-depth proof of a quality assurance system the latter being only incidentally discussed. Oertzen contends that the Army only performed a 90 minute preaward survey which was not sufficiently exhaustive to elicit the information Oertzen could have supplied to satisfy the Army.

"Responsibility" relates to a potential contractor's ability to meet certain general standards set forth in FAR § 9.104-1 (FAC 84-18), as well as any special standards set forth in a solicitation. The FAR standards include the requirements that a prospective contractor must have adequate financial resources to perform the contract, or the ability to obtain them; must be able to comply with the required delivery schedule; must have a satisfactory performance record; must have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; and must have the necessary production,

construction, and technical equipment and facilities or the ability to obtain them. FAR §§ 9.104-1(a)(b)(c)(e) and (f).

The regulations place the burden on a prospective contractor to affirmatively demonstrate its responsibility, FAR § 9.103(c) (FAC 84-18), and require that in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. FAR § 9.103(b) (FAC 84-18).

The determination of a prospective contractor's responsibility is the duty of the contracting officer who is vested with a wide degree of discretion and business judgment. We therefore will not question a nonresponsibility determination unless the protester shows bad faith on the part of the agency or that the determination lacks any reasonable basis. Gulton Industries, Inc., B-227132, Aug. 19, 1987, 87-2 CPD ¶ 179. Oertzen has not made the necessary showing here. Rather, the record reflects a reasonable basis for the contracting officer's decision.

In regard to Oertzen's financial capability, the specific financial qualifications to be considered are within the contracting officer's discretion and business judgment. Nova International, Inc., B-227696, Sept. 21, 1987, 87-2 CPD ¶ 284. The independent Schimmelpfeng report upon which the contracting officer relied was dated September 16, 1987, which was within 2 weeks of award and therefore sufficiently current. Moreover, Oertzen does not show why the information in the Schimmelpfeng report could not be relied upon. While Oertzen contends it offered to submit a performance bond, a performance bond in itself does not show that the offeror is financially responsible, but is just a guarantee to the government in event of default. A bond cannot serve as a substitute for a determination of financial responsibility, and the contracting officer may properly find an offeror nonresponsible even though a performance bond is offered. Consolidated Food Management Co., B-217254, June 12, 1985, 85-1 CPD ¶ 673; FAR § 28.103-2(d).

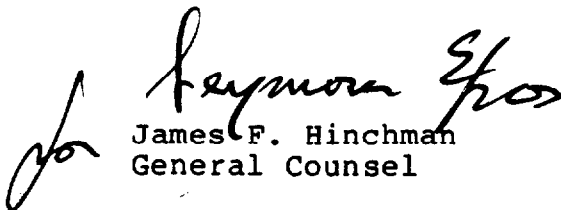
In regard to Oertzen's production capability, Oertzen argues that German law prohibits the release of payroll information, so it refused to provide this information when requested at the preaward survey. Oertzen states that it was improper for the contracting officer to find that Oertzen did not show the number and type of personnel it employs based on this refusal. As stated above, however, it is the burden of the offeror to affirmatively demonstrate its responsibility. FAR § 9.103 (c). The preaward surveyor was not required to question Oertzen exhaustively until

Oertzen would finally provide the relevant information showing the number and type of its personnel. Oertzen could have volunteered other information on its own initiative to establish this capability.

Oertzen's complaint that the preaward survey did not inquire sufficiently about its quality assurance system is similarly without merit. The contracting officer found that Oertzen's planning for quality assurance was totally insufficient since a quality assurance system recording deficiencies and monitoring corrective actions was not shown. Further, the RFP required the presence of a superintendent at the site every day, but Oertzen stated only that a site inspection would be performed at least three times a week. Oertzen complains that it merely answered questions from the surveyor and was not given any reason to think its responsibility was in doubt. Again, it was incumbent on Oertzen to provide the necessary proof of its responsibility, FAR § 9.103(c), and in view of the absence of information clearly indicating Oertzen's responsibility, the contracting officer was justified in finding Oertzen nonresponsible.

With regard to Oertzen's contention that the contracting officer should have held discussions with it, while the FAR allows the contracting officer to discuss preaward survey information with the prospective contractor, such discussions are not required. FAR § 9.105-3(b) (FAC 84-25). Moreover, responsibility determinations are administrative in nature and do not require the procedural due process otherwise necessary in judicial proceedings. Firm Reis GmbH, B-224544, B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72. Accordingly, a contracting officer may base a determination of nonresponsibility upon the evidence in the record without affording offerors the opportunity to explain or otherwise defend against the evidence, and there is no requirement that an offeror be advised of the determination in advance of the award. Id. FAR § 15.610(c), cited by Oertzen, relates to discussions concerning proposal deficiencies and is not applicable to an agency's determination of a firm's responsibility. Omneco, Inc., B-218343, B-218343.2, June 10, 1985, 85-1 CPD ¶ 660.

The protest is denied.


James F. Hinchman
General Counsel